***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLANT

ORIGINAL

76-7111

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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MARY SULLIVAN, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

-vs-

PHILIP SACCONE, individually and as Chief Clerk of the City Court of Rochester and LORRAINE PIETRANTONI, individually and as Assistant Court Clerk of the City Court of Rochester and both as representatives of all others similarly situated,

Defendants-Appellees.

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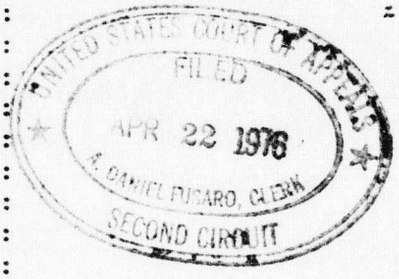


ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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## STATEMENT OF ISSUE PRESENTED

Is the plaintiff's claim, that a default judgment procedure which permits the entry of judgment without any judicial finding that the complaint states a cause of action violates due process, so obviously frivolous and essentially fictitious as to fail to raise a substantial constitutional question?

The District Court held in the affirmative.

## STATEMENT OF THE CASE

In this action plaintiff-appellant Sullivan (hereafter referred to as "Sullivan") challenges the constitutionality of a provision of the New York Civil Practice Law and Rules, §3215, relating to the entry of judgments by default. Also challenged are the provisions of various other New York procedural statutes which incorporate by reference the procedures set forth in C.P.L.R. §3215[5]. The challenged procedures permit the entry of a judgment against a defaulting defendant in an action where the plaintiff's claim is for "a sum certain or for a sum which by computation can be made certain" upon application to the clerk of the court. C.P.L.R. §3215(a). The statutes require no judicial review of the allegations contained in the complaint, nor do they require any finding that the allegations establish a cause of action for which relief may be granted.

On June 26, 1973, Sullivan borrowed $533.55 from the American Finance Corporation (hereafter "lender") and signed a note promising to repay the principal, plus interest at an annual rate of 24.25% per annum, through 36 monthly installments. The interest was precomputed and added to the principal and other charges (insurance, filing fees, etc.) and the note

was given in the amount of $756.00, of which $222.55 was the precomputed interest [11].[1]

When plaintiff Sullivan failed to make a timely payment on the second installment counsel for the lender brought an action in the City Court of the City of Rochester, New York, claiming a sum certain in the amount of $735.00 [12]. Service was accomplished by delivery of a copy of a summons with endorsed complaint upon Sullivan's daughter and by mailing a copy of said documents, addressed to Sullivan at ther home address [12].[2] This procedure was in compliance with New York's service requirements and is not contested. Cf. New York Civil Practice Law and Rules §308.2.

Sullivan never received actual notice and failed to respond to the lender's process [12]. On November 25, 1973, counsel for the lender submitted the required documents to defendant-appellee Pietrantoni, an assistant to the City Court Clerk, defendant-appellee Saccone, and Pietrantoni entered judgment against Sullivan in favor of the lender in the amount of $800.00, which included the $735.00 prayed for in the complaint and $65.00 is costs and expenses [13-14].

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1. Such a procedure is authorized by New York Banking Law §352.

2. Copies of the state court documents are attached to the complaint herein as exhibits C-F [21-25].

The judgment included the entire amount of precomputed interest on the note and was not reduced to rebate the unearned interest as required by New York Banking Law §352(d)(1). This resulted in a judgment being entered which exceeded by $155.45 the amount for which a judgment could legally have been given on November 5, 1973 [36].

The entry of the default judgment by Pietrantoni was a purely ministerial act, accomplished without any judicial oversight and without any determination as to whether the facts alleged by the lender justified a granting of the relief requested [36]. These procedures are fully authorized by the challenged statute, N.Y. C.P.L.R. §3215(a) [37].

This action was brought to challenge the authority of public officials to enter judgments without any participation in the process by a judicial officer. Sullivan asserts that such procedures deprive her of the protection of due process guaranteed by the Fourteenth Amendment to the Constitution of the United States and seeks, on her own behalf and on behalf of all others similarly situated, declaratory and injunctive relief against all New York State public officials who are purportedly authorized by statute to effect such procedures.

Subsequent to the voluntary dismissal of two defendants and the filing of an answer by the defendant court clerks, Sullivan requested the convening of a three-judge court to hear her motions for class certification and partial summary judgment [38]. The motion was supported not only by an affidavit but also by a statement of stipulated facts [35-37] and certain admissions [31-34].

No cross-motions were made.

The District Court denied the request for a three-judge court, "in the exercise of discretion" [55], and dismissed the action, presumably for lack of jurisdiction.

## ARGUMENT

### POINT I

### THE COMPLAINT HEREIN RAISES A SUBSTANTIAL CONSTITUTIONAL ISSUE

The issue raised by Sullivan is simply stated:

> Does the due process clause of the Fourteenth Amendment require that a state court judgment be founded upon the determination of a judicial officer that the asserted claim has merit in law?

The court below dismissed the action on the ground that this issue was constitutionally insubstanial [55].

The standards established by the Supreme Court require that the dismissal of a constitutional claim be based on a finding that the issues raised "are wholly insubstantial or obviously frivolous or that decisions of the Supreme Court foreclose the subject", Holley v. Lavine, Docket No. 75-7468, slip op. at 1772 (2nd Cir. February 3, 1976), or are "essentially fictitious", Hagans v. Lavine, 415 U.S. 528, 537 (1974). As the Supreme Court noted in Goosby v. Osser, 409 U.S. 512 (1973):

> [t]he limiting words "wholly" and "obviously" have cogent legal significance. In the context of the

> effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. §2281. 409 U.S. at 518.

The court below failed to elucidate on its finding of insubstantiality and, indeed, dismissed the action "out of hand". Cf. Holley v. Lavine, supra at 1772. The ground of the defendants' opposition to the Sullivan request for a three-judge court[3] was that decisions of the Supreme Court, specifically D.H. Overmyer Co., Inc. v. Frick Company, 405 U.S. 174 (1972) and Swarb v. Lennox, 405 U.S. 191 (1972), "appear to make the constitutional issues presented in the instant case wholly insubstantial." Regan affidavit paragraph 6 [52]. This ground was presumably that relied upon by the court below.[4]

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3. There was no cross-motion to dismiss or for summary judgment.

4. See Weisman v. LeLandais , Docket No. 75-7250, slip op. at 2707 (2nd Cir. March 22, 1976).

A. The decisions of the Supreme Court do not foreclose the questions raised in this case.

Counsel have been unable to find any decision of the Supreme Court determining whether the due process clause requires that a state court judgment be based on a judicial finding that the complaint states a cause of action. The cases cited in opposition to Sullivan's motion for a three-judge court were companion cases in which the Supreme Court addressed a due process challenge to provisions of Pennsylvania and Ohio statutes which permitted the entry of judgment on the basis of cognovit notes. In Overmyer, supra, the specific issue raised was whether it is "unconstitutional to waive in advance the right to present a defense in an action on [a] note." 485 U.S. at 184. The Court decided that the concept of a waiver was applicable to such a situation and that, even if the due process standard to be applied to the waiver was that it be voluntary, knowingly and intelligently made, such a test standard was met under the particular circumstances of that case.[5] 485 U.S. at 186.

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5. The case involved agreements between corporate entities which had engaged in direct negotiations over an extended period of time. 405 U.S. at 182.

In Swarb, the Court was also presented with the issue of waiver of a right to notice and to be heard under a cognovit procedure. 405 U.S. at 198. The three-judge district court held that if there had been no voluntary consent then due process required notice and an opportunity to be heard. Swarb v. Lennox, 314 F. Supp. 1091, 1095 (E.D. Pa. 1970). Since only the plaintiffs appealed, the Supreme Court passed only on their claim that the procedures were facially unconstitutional and not on the district court finding of unconstitutionality only as applied to a certain class of persons.[6] The Court found the statutes facially constitutional. 405 U.S. at 200.

Both of these cases concerned the voluntariness of an express waiver of notice and hearing and the constitutionality of such a procedure. They did not reach the questions raised in this case and cannot reasonalby be viewed as foreclosing the issue raised here. In the present case no question of waiver is involved. Sullivan never consented, either

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6. The district had defined a class of plaintiffs to include natural persons residing in Pennsylvania with incomes of less than $10,000.00 annually. 314 F. Supp. at 1099.

voluntarily or otherwise, to the entry of a judgment against her.[7]

Consequently, the district court's dismissal of the action cannot be affirmed on the grounds that prior decisions of the Supreme Court foreclose the subject.

B. Plaintiff's constitutional claims are neither obviously frivolous nor essentially fictitious.

The case law is sparse in its discussion of what the terms "obviously frivolous" and "essentially fictitious" mean when applied to claims raised in constitutional litigation. In his dissent in Hagans v. Lavine, supra, Mr. Justice Rehnquist described the Court's decision as requiring only that the plaintiff be able "to plead his claim with a straight face." 415 U.S. at 564. The majority opinion spoke in terms of the insubstantial nature of the claim being "immediately obvious," 415 U.S. at 542, and requiring "no meaningful consideration," id. at 541.

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7. In New York a default in appearance does not admit liability but simply admits the factual allegations of the complaint. McClelland v. Climax Hosiery Mills, 252 N.Y. 347, 351 (1930); Falk v. Krumm, 39 Misc. 2d 448, aff'd 22 A.D. 2d 911 (2nd Dept. 1964). See also, Thomson v. Wooster, 114 U.S. 104 (1885).

Reported cases in which plaintiffs fail to meet this minimal test are difficult to find. While this court has recently found equal protection claims insubstantial, such decisions are generally based on Supreme Court decisions foreclosing the issue, e.g. Andrews v. Mayer, 525 F.2d 113 (2nd Cir. 1975), and not on a finding that the claims raised are obviously frivolous or essentially fictitious.

A recent district court case involving voting rights has made a determination arguably based on such a standard, discussing the issue at some length. In Porras v. Nichol, 405 F. Supp. 1178 (D. Neb. 1975), the plaintiffs challenged the constitutionality of Nebraska statutes governing write-in votes on the theory that they discriminated against the less educated and illiterate voter and those unable to spell. The court noted the absence of any case law directly in point and held that, since the statutes did not bar anyone from voting, "no meritorious argument can be envisioned" which could support the plaintiffs' claim. 405 F. Supp. at 1183.

An issue similar to the present one was before this court in Valezquez v. Thompson, 451 F.2d 202 (2nd Cir. 1971), where the various provisions of New York's summary repossession statute were challenged on the grounds, inter alia, that the notice provisions were not sufficient to comply with the due process clause of the Fourteenth Amendment. This court approved

the application of a more rigorous standard than that subsequently permitted by Goosby, supra,[8] and found the challenges insubstantial. Although the district court opinion refers to a request that the state court be required to "consider the merits of the petitioner's claim" in default situations, 321 F.Supp. at 40, it appears from that court's further discussion that the plaintiffs in Valezquez had asserted that the petitioner in a summary proceeding must submit proof of his allegations even upon default. It does not appear that the question of whether the petition must simply be reviewed by a judge to determine if it states a cause of action was addressed. The decision of this court did not discuss these problems in any detail but dealt primariy with the notice provisions of the statute.

Indications that the plaintiff's claim is neither essentially fictitious nor obviously frivolous are found in recent decisions of the Supreme Court which recognize the pivotal importance, in cases challenging state judicial procedures on due process grounds, of the actual involvement of a judicial officer. Early cases found due process violations where provisional remedies were provided by statute involving

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8. Cf. Heaney v. Allen, 425 F.2d 869 (2nd Cir. 1970).

the issuance of mandates through the ministerial acts of non-judicial court officials. See Snaidach v. Family Finance Corp., 395 U.S. 337 (1969) (pre-judgment garnishment of wages), and Fuentes v. Shevin, 407 U.S. 67 (1972) (pre-judgment attachment of personal property). These cases recognized that ex parte applications did not provide adequate protections for the defendant.

In Mitchell v. Grant, 416 U.S. 600 (1974), the Court distinguished Snaidach and Fuentes, supra in upholding a Louisiana pre-judgment sequestration procedure. The basis of the decision in Mitchell which supports the plaintiff's claim in this action, was the involvement of a judicial officer in the process.

> Mitchell was not at the unsupervised mercy of the creditor and court functionaries. The Louisiana law provides for judicial control of the process from beginning to end. 416 U.S. at 616.

The Court also recognized that the traditional view of due process required an adequate opportunity for an "ultimate judicial determination of liability" (emphasis added). 416 U.S. at 611 (quoting Phillips v. Commissioner, 283 U.S. 589, 597 [1931]). The importance of judicial involvement was subsequently reaffirmed by the Court in striking down a Georgia

pre-garnishment statute in North Georgia Finishing, Inc. v. Di-Chem, Inc., 95 S.Ct. 719 (1975).

In several states the amount of judicial process due a defaulting defendant has long included an impartial determination that the complaint states a cause of action. In Williams v. Knighton, 1 Ore. 234 (1856), a judgment was taken on a note by default where the complaint simply stated that the plaintiff "has a cause of action against the defendant, and expects to recover judgment for five hundred dollars, with interest, &c., as per a promissory note, which he holds against him ...". The Supreme Court of Oregon reversed the judgment for failure to state a cause of action. In Campbell & Jones v. State Central Bank, 1 Tex. Civ. Cas., §378 (1883), a Texas court, citing a prior decision of the Texas Supreme Court, held that "[t]he defendant, by his default, submits the contract, and his rights under it, to the court, and the contract, being plainly void on its face [due to a usurious interest rate], in part, must be so declared and judged by the Court." See also Hussey & Hussey v. Smith, 1 Utah 241 (1875).

More recent cases also require a judicial finding of a stated cause of action in default situations. The Supreme

Court of Nebraska has held that

> where the defendants are in default in such action, the allegations are to be taken as true, and if the petition states a cause of action, the plaintiff is entitled to judgment ... (emphasis supplied). Danbom v. Danbom , 273 N.W. at 506 (Neb. 1937).

In some states, plaintiffs are required not only to state a cause of action in their pleadings, but to proceed with proof upon the defendant's default. Annotation, Necessity of Taking Proof as to Liability against Defaulting Defendant, 8 A.L.R. 3rd 1070 (1966). See also, New York Domestic Relations Law, §211.

The present case raises the question of the bounds of governmental power over those not actually involved in its processes. The law has long recognized the power of government to enforce the legitimate claims of private litigants, once established, through the force of its authority and manpower. Indeed, the entry of a simple money judgment, as in this case, may lead to governmentally enforced seizure of the judgment debtor's personal and real property, attachment of his wages, and even incarceration if he fails with judicial mandates to make payments against the judgment. See, generally, New York Civil Practice Law and Rules, Article 52, Enforcement of Money Judgments.

In an age where a great volume of disputes over personal debts are presented to the courts, and where a great many defendants fail to appear to challenge the allegations of the complaining party,[9] the power of the state to grant extraordinary process to the creditor must be judiciously employed. The state's recognition of the legitimacy of the creditor's claim, in the form of a judgment, can properly occur only after upon "the determination ... pronounced by a competent judge or court, as the result of an action or proceeding in such court, affirming that, upon the matters submitted for its decision, a legal liability does or does not exist" ( 1 Black, Judgments, §1 p.2). Atlas Credit Corp. v. Ezrine, 25 N.Y. 2d 219 (1969).

The procedures presently followed in the State of New York require no judicial determination that a liability does or does not exist, but grants the full power of the official enforcement mechanism to a plaintiff whose defendant has not appeared, even where the plaintiff has failed to plead a proper claim. Such a procedure raises grave constitu-

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9. See Alderman, Imprisonment for Debt: Default Judgments, the Contempt Power and the Effectiveness of Notice Provisions in the State of New York, 24 Syracuse Law Review 1217 (1973); Dreyfus, Due Process Denied: Consumer Default Judgments in New York City, 10 Columbia Journal of Law and Social Problems 370 (1974); Novak, Report of the Default Judgment Study, exhibit 1 to affidavit of K. Wade Eaton, Esq. [43].

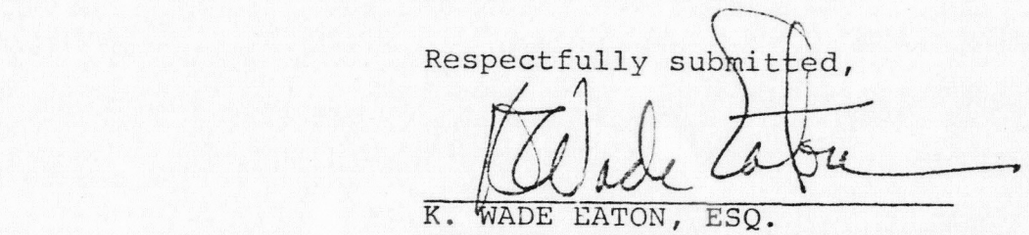
tional questions and Sullivan's attack upon it should not have been dismissed as frivolous.

## CONCLUSION

The order and judgment of the district court dismissing this action should be reversed and the case remanded for the convening of the three-judge court.

Dated: April 16, 1976
Rochester, New York

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of April, 1976, I served the foregoing Appellant's Brief upon counsel for the appellees, by causing two copies to be mailed, postage prepaid, to:

JOSEPH A. REGAN, ESQ.
Municipal Attorney
46 City Hall
Rochester, New York 14614

K. WADE EATON, ESQ.

Dated: April 19, 1976

## § 3215. Default judgment

(a) Default and entry. When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him. If the plaintiff's claim is for a sum certain or for a sum which can by computation be made certain, application may be made to the clerk within one year after the default. The clerk, upon submission of the requisite proof, shall enter judgment for the amount demanded in the complaint or stated in the notice served pursuant to subdivision (b) of rule 305, plus costs and interest. Upon entering a judgment against less than all defendants, the clerk shall also enter an order severing the action as to them. When a plaintiff has failed to proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the defendant may make application to the clerk within one year after the default and the clerk, upon submission of the requisite proof, shall enter judgment for costs. Where the case is not one in which the clerk can enter judgment, the plaintiff shall apply to the court for judgment.

**(b) Procedure before court.** The court, with or without a jury, may make an assessment or take an account or proof, or may direct a reference. When a reference is directed, the court may direct that the report be returned to it for further action or, except where otherwise prescribed by law, that judgment be entered by the clerk in accordance with the report without any further application. Except in a matrimonial action, no finding of fact in writing shall be necessary to the entry of a judgment on default. The judgment shall not exceed in amount or differ in type from that demanded in the complaint or stated in the notice served pursuant to subdivision (b) of rule 305.

**(c) Default not entered within one year.** If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. A motion by the defendant under this subdivision does not constitute an appearance in the action.

**(d) Place of application to court.** An application to the court under this section may be made, except where otherwise prescribed by local court rules, by motion at any trial term in which the action is triable or at any special term in which a motion in the action could be made. Any reference shall be had in the county in which the action is triable, unless the court orders otherwise.

(e) Proof. On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316, and proof by affidavit made by the party of the facts constituting the claim, the default and the amount due. Where a verified complaint has been served it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or his attorney. When jurisdiction is based on an attachment of property, the affidavit must state that an order of attachment granted in the action has been levied on the property of the defendant, describe the property and state its value.

(f) Notice.

1. Notice is not required when the judgment may be entered by the clerk. Except as otherwise provided with respect to specific actions, if application must be made to the court, any defendant who has appeared is entitled to at least five days' notice of the time and place of the motion, and if more than one year has elapsed since the default any defendant who has not appeared is entitled to the same notice unless the court orders otherwise. The court may also dispense with the requirement of notice when a defendant who has appeared has failed to proceed to trial of an action reached and called for trial.

2. Where an application for judgment must be made to the court, the defendant who has failed to appear may serve on the plaintiff at any time before the motion for judgment is heard a written demand for notice of any reference or assessment by a jury which may be granted on the motion. Such a demand does not constitute an appearance in the action. Thereupon at least five days' notice of the time and place of the reference or assessment by a jury shall be given to the defendant by service on the person whose name is subscribed to the demand, in the manner prescribed for service of papers generally.

**(g) Judgment for excess where counterclaim interposed.** In an action upon a contract where the complaint demands judgment for a sum of money only, if the answer does not deny the plaintiff's claim but sets up a counterclaim demanding an amount less than the plaintiff's claim, the plaintiff upon filing with the clerk an admission of the counterclaim may take judgment for the excess as upon a default.

**(h) Default judgment for failure to comply with stipulation of settlement.** 1. Where, after commencement of an action, a

stipulation of settlement is made, providing, in the event of failure to comply with the stipulation, for entry without further notice of a judgment in a specified amount with interest, if any, from a date certain, the clerk shall enter judgment on the stipulation and an affidavit as to the failure to comply with the terms thereof, together with a complaint or a concise statement of the facts on which the claim was based.

2. Where, after commencement of an action, a stipulation of settlement is made, providing, in the event of failure to comply with the stipulation, for entry without further notice of a judgment dismissing the action, the clerk shall enter judgment on the stipulation and an affidavit as to the failure to comply with the terms thereof, together with the pleadings or a concise statement of the facts on which the claim and the defense were based.

As amended L.1964, c. 290; L.1965, c. 148; L.1965, c. 749, §§ 2, 3; L.1966, c. 487; L.1967, c. 31; L.1968, c. 720.